

1 Honorable Thomas O. Rice  
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7 Scott A. Volyn  
8 Volyn Law Firm  
9 23 South Mission St., Ste. B  
10 Wenatchee, WA 98801  
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16 **UNITED STATES DISTRICT COURT**  
17 **EASTERN DISTRICT OF WASHINGTON**

18 I.V., a minor child; and APRIL  
19 OLIVARES and FERNANDO  
20 OLIVARES VARGAS, parents of I.V.

21 Plaintiffs,

22 vs.

23 Y.A.F., a minor child, MARIA M.  
24 PEREZ FLORES, as guardian of  
25 Y.A.F., WENATCHEE SCHOOL  
1 DISTRICT NO. 246, a political  
2 subdivision,

3 Defendants.

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**No. 2:17-CV-118-TOR**

27 **PLAINTIFFS' PETITION FOR**  
28 **APPROVAL OF MINOR'S**  
29 **SETTLEMENT AND**  
30 **ALLOCATION OF**  
31 **SETTLEMENT PROCEEDS**

32 **Noted for Consideration:**  
33 **11/20/2018**

34 **With Oral Argument**

35 **I. Introduction**

36 This case arises from allegations of bullying and sexual harassment of Plaintiff  
37 I.V. by fellow student A.F. while both were students at Orchard Middle School  
38 ("OMS") in the Wenatchee School District ("WSD"). Plaintiffs have reached a  
39 settlement with the WSD and therefore respectfully move the Court for approval of  
40 the Settlement, including the allocation of the settlement funds and payments for  
41 attorneys fees and costs as set forth below.

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## **II. Statement of Facts**

## A. Procedural Background

On March 31, 2017, Plaintiffs filed a complaint in the United States District Court for the Eastern District of Washington. *See generally* ECF. No. 1.

On September 1, 2017, the Court entered a scheduling order that set the trial of this matter to begin October 22, 2018 in Spokane, Washington. ECF 22.

On October 2, 2018 the parties engaged in a full-day mediation with the assistance of Mr. Gregg Bertram of Pacific ADR Consulting. *See* Declaration of Scott

## A. Volyn (“Volyn Decl.”)

The proposed Guardian ad Litem, Mr. Jonathan Volyn of the Idaho law firm Volyn Law Office, an experienced attorney licensed in both Idaho and Washington State, participated in the mediation by telephone, email, and Skype throughout the process of mediation. *Id.* The mediation culminated in a C2A Settlement Agreement (the “Settlement Agreement”) between Plaintiffs and Defendant WSD. *See id.*, Ex. 1.

#### B. Minor Plaintiff

Plaintiff I.V. was born May 2, 2001 and will be 17 years old by the time of the hearing.

## C. Factual Background

While Plaintiff I.V. was a 14 year old student at Orchard Middle School, he was the victim of sexual molestation, assault, abuse, threats and bullying. *ECF 1, pp.4-5.*

All of these acts took place on school grounds. (*Id.*) Beginning in 2013, when I.V. entered the 6<sup>th</sup> Grade, he was immediately bullied, harassed and his very life was even threatened. (*Id.*) As a direct result to his being physically assaulted threatened and bullied, I.V. developed critical physical and mental health issues which required hospitalization to save his life. *ECF 1, pp. 7-8.* In Early 2015, I.V. disclosed the bullying and abuse at school to his parents, but I.V. was unwilling to identify the bully. I.V.'s mother then contacted the school's counselor, Defendant Ronda Brender and informed her of the bullying and abuse and the impact it was having on I.V. Ms. Brender said she would speak with other students and then identify the bully to the Plaintiff. The bully was not located by any agent of the school and I.V. continued to suffer the continued abuse, threats and assaults. *ECF 1, p. 8.*

After being hospitalized again and requiring intensive in-home medical care, on January 3, 2016, I.V. disclosed the identity of his tormentor to his parents, telling them he was afraid to go back to school after the winter break. *ECF 1, p. 9.* The next day, Ms. Olivares met with Taunya Brown, the school principal, to disclose the bullying of I.V. by Y.A.F. During the meeting, I.V. reported that Y.A.F. had threatened to kill him. Principal Brown promised to take action, but in fact did nothing. (*Id.*) Ms. Olivares reported the situation to the police and the next day Y.A.F. was arrested. The Police investigation uncovered past school video evidence of the bullying events and Y.A.F. admitted to threatening I.V. Confronted with video evidence of the assaults,

1 the school justified its inaction by claiming a high volume of potential video footage  
2 caused it to ignore the potential evidence. *ECF 1, p. 10.*

3  
4 On January 19, 2016, Chelan County Superior Court Judge T.W. Small signed  
5 and filed a protection order restraining Y.A.F. from any contact with I.V. and from  
6 attending the school in question. (*Id.*) Ms. Olivares informed both principal Brown  
7 and Counselor Brenner of the protection order prohibiting Y.A.F. from attending  
8 school. Despite that, Y.A.F. was allowed to continue to attend school and bully I.V.,  
9 in violation of the court's protection order. *ECF 1, p. 10-11.*

10  
11 On February 4, 2016, Ms. Olivares contacted WSD Executive Director of  
12 Student Services Mr. Helm, who admitted the district was at fault for wrongfully  
13 allowing Y.A.F. to attend school and continue to bully I.V. in violation of the  
14 protection order. He said, as a former principal, he would never have allowed  
15 something like this to happen. *ECF 1, p. 12.*

16  
17 On February 21, 2016, Ms. Brenner contacted another student asking if they  
18 knew of I.V. suing the school, asking the student to speak with a lawyer, and  
19 requesting help in an effort to save Principal Brown's job. (*Id.*)

20  
21 Y.A.F.'s bullying and threats of I.V. on school property continued. As a direct  
22 consequence, I.V. attempted to commit suicide and was again hospitalized for mental  
23 and physical health issues. *ECF 1, p. 13.*

1           **D. Plaintiffs Thoroughly Investigated This Case**

2           Before filing this case Plaintiff's counsel spent many months counseling with  
 3           the family on related legal issues and investigating the factual bases of Plaintiff's  
 4           claims against the Defendant, researching related legal issues, and preparing the  
 5           complaint. *See* Volyn Decl. ¶3.

6           After the complaint was filed, Plaintiff's counsel conducted substantial  
 7           discovery, requesting and receiving hundreds of pages of documents from Defendants  
 8           and third parties. *Id.* ¶4. The parties conducted 12 depositions, including two expert  
 9           depositions. *Id.* ¶5 In addition, Defendants subjected Plaintiff and his mother to  
 10           psychiatric evaluation/examination. Plaintiff's counsel also spent a considerable  
 11           amount of time interviewing many potential witnesses.

12           Finally, the parties engaged in extensive motion practice, including multiple  
 13           motions for summary judgment. At the time of mediation, substantial trial preparation  
 14           had already begun, and motions in *limine* and jury instructions had already been  
 15           drafted.

16           **E. The Settlement Agreement**

17           Pursuant to the Settlement Agreement, the WSD will pay a total of \$37,500.00  
 18           which includes the Plaintiff's pro rata cost of mediation. Upon approval of the  
 19           settlement, the parties will enter a Stipulation and Order of Dismissal with Prejudice  
 20           encompassing all claims and parties to the litigation.

## **F. Proposed Allocation of the Settlement Proceeds**

Plaintiffs seek to have the settlement proceeds allocated as follows: \$35,000 for the claims of Plaintiff I.V., and \$2,500.00 for the claims of the parents of I.V. The guardian ad litem proposes the same allocation.

#### **G. Attorneys Fees and Costs**

Plaintiff's counsel are applying for an award of \$2,000.00 (reduced from \$7,847.90) in actual costs and \$15,000.00 in attorneys fees.

### III AUTHORITY

## A. The Settlement Serves the Best Interests of the Minor Plaintiffs

District courts have a special duty, derived from Fed. R. Civ. P. 17 (c) to safeguard the interests of litigants who are minors. Rule 17 (C) provides, in relevant part, that a district court “must appoint a guardian ad litem – or issue another appropriate order- to protect a minor or incompetent person who is unrepresented in an action.” In the context of proposed settlements in suits involving minor plaintiffs, this special duty requires a district court to conduct its own inquiry to determine whether the settlement serves the best interests of the minor, “in light of the facts of the case, the minor’s specific claim, and recovery in similar cases.”

If the Court approves the settlement value designated for I.V.'s parents, and for counsel's costs and fees, Plaintiff I.V. will receive a net recovery of \$18,000.00 and I.V.'s parents will receive a net recovery of \$2,500.00.

1       1. The Settlement is Fair and Reasonable in light of Plaintiff's Claims

2              Entering into mediation, Plaintiffs and Plaintiffs' counsel were confident in the  
 3 strength of their cases, but also pragmatic in their awareness of the risks inherent to  
 4 litigation and the various defenses available to Defendants. The reality that Plaintiffs  
 5 could end up recovering only a fraction of the amount obtained through settlement or  
 6 losing the case at or before trial was enough to convince Plaintiffs and their counsel  
 7 that the Settlement Agreement reached with the WSD outweighs the gamble of  
 8 continued litigation.

9              Plaintiffs' claims against the WSD turned on proving that the school district  
 10 had notice of improper conduct by Defendant Y.A.F. before he sexually assaulted  
 11 Plaintiff I.V. The WSD maintained that it did not have such notice and, moreover,  
 12 sought to exclude evidence related to Defendant Y.A.F.'s inappropriate conduct with  
 13 male students in the WSD before he sexually assaulted Plaintiff I.V. If the WSD  
 14 succeeded in excluding critical notice evidence, Plaintiffs' damages against the WSD  
 15 could have been substantially reduced or eliminated altogether.

16              Another risk Plaintiffs faced going forward was the potential that the WSD  
 17 would convince a jury that Defendant Y.A.F. was at fault, thereby limiting the amount  
 18 Plaintiffs would be able to collect from the WSD of any judgment entered against  
 19 Defendants. *See* ECF No. 16. In particular, the WSD asserted an affirmative defense  
 20 stating Plaintiffs' injuries and damages were caused by the intentional acts of Y.A.F.

1 and Defendants would be entitled to a *Tegman/Rollins* jury instruction at trial. If the  
 2 WSD had been permitted to instruct the jury to segregate damages, Plaintiffs would  
 3 have faced significant risk that they would have been unable to collect all or a  
 4 significant portion of any judgment from Defendant Y.A.F., whose ability to pay is  
 5 highly uncertain.  
 6

7 Finally, there is a substantial risk of losing inherent in any jury trial. Even if  
 8 Plaintiffs did prevail, any recovery could be delayed for years by an appeal. The  
 9 Settlement Agreement provides substantial relief to Plaintiffs without further delay  
 10 and without going through the arduous and adversarial process of a public trial.  
 11

12       2.     The Settlement is Fair and Reasonable in Light of The Minor's  
 13            Plaintiff's Net Recovery

14       Assuming the Court grants the proposed allocation and the requested attorneys  
 15 fees and costs, Plaintiff I.V. will receive a net recovery of \$18,000.00 and Plaintiff's  
 16 April Olivares and Fernando Vargas will receive a net recovery of \$2,500.00. Under  
 17 the Settlement, Plaintiffs avoid all the risks and obstacles to recovery and receive  
 18 substantial benefits, and in a timely fashion. The Settlement serves the best interests  
 19 of the Plaintiff I.V.  
 20

21       **B.     The Agreed Upon Attorneys' Fees and Costs are Fair and Reasonable**

22       Plaintiffs' counsel seeks an attorneys' fees award of \$15,000.00 from the  
 23 settlement proceeds. This award amounts to forty percent (.40) of the settlement  
 24

1 proceeds in accordance with the fee agreement. Plaintiffs' counsel also seeks  
 2 reimbursement of \$2,000.00 (reduced from \$7,847.90) in out-of-pocket expenses  
 3 associated with this case.

4       The reasonableness of attorneys' fees is within the discretion of the court, to be  
 5 determined from a consideration of such factors as the nature of the time and labor  
 6 required; the fee customarily charged; the amount involved and the results obtained;  
 7 the nature and length of the professional relationship with the client; the experience,  
 8 reputation, and ability of counsel; whether the fee is fixed or contingent; and the terms  
 9 of the fee agreement. RPC 1.5 (a). A Reasonable fee is also determined by reference  
 10 to "the 'lodestar' figure, which is the number of hours reasonably expended multiplied  
 11 by a reasonable hourly rate." *Gates v. Deukmejian*, 987 F.2d 1392, 1397 (9<sup>TH</sup> Cir.  
 12 1992); *see also In re Settlement/Guardianship of AGM*, 154 Wn. App. 58, 79 (2010)  
 13 (approving the lodestar method in a minor settlement, finding it is "the clearly  
 14 preferred method for calculating attorney fees in Washington"). Plaintiffs' counsel  
 15 requests for fees is reasonable under either analysis.

21       1.     The Contingency Agreement is Reasonable

22       The written contingency agreement in this case provides for attorneys fees of  
 23 40%. *See Volyn Decl., ¶¶ 15-16.* The fee required by the contingent fee agreement  
 24 represents the fee Plaintiffs' counsel customarily charges in such matters. *See Volyn*  
 25 *Decl., ¶¶ 15-16.* Plaintiffs' counsel have been working together with Plaintiffs since

1 February of 2016. *Id.* Ultimately, Plaintiffs commenced this action to hold Defendants  
 2 accountable for the horrendous harms inflicted upon Plaintiff I.V. and Plaintiffs'  
 3 counsel has expended time and resources to not only effectively prosecute this case  
 4 but to also ensure that Plaintiffs were protected through the process. *See* Section  
 5 III.B.2, *infra*. Furthermore, Plaintiffs' counsel is an experienced litigator. *See* Volyn  
 6 Decl., ¶¶(9-11). Plaintiffs' counsel developed an extensive factual record in this case  
 7 and engaged in significant motions practice that were essential to achieving the  
 8 Settlement.  
 9

10 Finally, prosecution of this action involved financial risk for Plaintiffs' counsel.  
 11 Plaintiffs' counsel undertook this matter solely on a contingent basis, with no  
 12 guarantee of recovery. *See* Volyn, Decl., Ex. 2.  
 13

14       2. Lodestar Analysis Supports the Contingency Agreement

15       The requested attorneys fees are also reasonable under the lodestar method.  
 16 "Under the lodestar/multiplier method, the district court first calculates the 'lodestar'  
 17 by multiplying the reasonable hours expended by a reasonable hourly rate." *In re*  
 18 *Wash. Pub. Power Supply Sys. Sec. Litig.*, 19 F.3d 1291, 1295 n.2 (9<sup>th</sup> Cir. 1994); *see*  
 19 *also Staton*, 327 F.3d at 965. If circumstances warrant, the court may adjust the  
 20 lodestar to account for other factors which are not subsumed within it. *Staton*, 327  
 21 F.3d at 956 & n.17. Upward adjustments may be appropriate based on the results  
 22 obtained, the quality of representation, or the delay in payment to class counsel. MCL  
 23  
 24

1       4<sup>th</sup> § 14.13, at 266-68. For example, “to compensate prevailing parties for any delay  
 2 in the receipt of fees,” courts will often apply “current rather than historic rates in  
 3 order to adjust for inflation and the loss of funds.” *Gates v. Deukmejian*, 987 F.2d  
 4 1392, 1406 (9<sup>th</sup> Cir. 1992) (“A fee award at current rates is intended to compensate  
 5 prevailing attorneys for lost income they might have received through missed  
 6 investment opportunities as well as lost interest.”) *see also* MCL§ 14.13, at 197.

9       When examined through the lens of the lodestar calculation method, the  
 10 payment of \$15,000.00 for attorneys’ fees is shown to be fair and reasonable. Over  
 11 the past two and a half years, Plaintiffs’ counsel has spent more than 175 hours  
 12 counseling Plaintiffs on related legal matters, and investigating and prosecuting this  
 13 case. *See* Volyn Decl., ¶¶ 3-7. Calculated using their current hourly rates, counsel’s  
 14 lodestar is \$61,250.00. *See* Volyn Decl., ¶12.

17       The lodestar calculations of Plaintiffs’ counsel are based on reasonable hourly  
 18 rates. Plaintiffs’ counsel set their rates for attorneys and staff members based on a  
 19 variety of factors, including among others; the experience, skill and sophistication  
 20 required for the types of legal services typically performed; the rates customarily  
 21 charged in the markets where legal services are typically performed; and the  
 22 experience, reputation and ability of the attorneys and staff members. The rates  
 23 charged for attorneys and staff members working on this matter range from \$75 to  
 24  
 25  
 26

1 \$350, with the majority of the work performed by Mr. Volyn at an hourly rate of \$350.  
 2  
 3

See Volyn Decl., ¶12.

4 In short, Plaintiffs requested attorneys fee award is reasonable and appropriate,  
 5 and should be granted.  
 6  
 7

### 3. Plaintiffs Counsel's Out-of-Pocket Expenses Were Reasonably Incurred

8 To date, Plaintiffs' counsel has incurred out-of-pocket litigation expenses  
 9 totaling \$7,847.90, primarily to cover expenses related to investigation, filing fees,  
 10 discovery, travel, and mediation fees. See Volyn Decl., ¶ 12. Plaintiffs' counsel seeks  
 11 reimbursement of \$2,000.00 of their hard costs only.  
 12

13 Plaintiffs' counsel's out-of-pocket costs were necessary to secure the resolution  
 14 of this litigation. While Plaintiffs' counsel worked to keep the costs down, this case  
 15 involved significant discovery costs, particularly in light of Defendants' many experts,  
 16 including one expert on school district polices, practices and procedures. In total, the  
 17 parties conducted more than 12 depositions throughout the state and the country.  
 18  
 19

20 In sum, the \$15,000.00 requested attorneys' fees and reimbursement of  
 21 \$2,000.00 in out-of-pocket expenses are fair and reasonable "in light of the facts of  
 22 the case, the minor's specific claim, and recovery in similar cases." *Robidioux*, 638  
 23 F.3d at 1182.  
 24  
 25  
 26

1  
2                   **IV. CONCLUSION**  
3

4                   For these reasons, Plaintiffs respectfully request the Court approve the minor's  
5 settlement, including the allocations of the settlement funds and payments for  
attorney's fees and costs.  
6

7                   RESPECTFULLY SUBMITTED AND DATED this 15<sup>th</sup> day of  
8 November, 2018.  
9

10                   VOLYN LAW FIRM, PLLC  
11

12                   /s/ Scott A. Volyn  
13                   SCOTT A. VOLYN, WSBA #21829  
14                   Attorney for Plaintiffs  
15

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22  
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25  
26

1                   **CERTIFICATE OF SERVICE**  
2

3                   The undersigned makes the following declaration certified to be true under  
4                   penalty of perjury pursuant to RCW 9A.72.085:

5                   I hereby certify that I electronically filed the foregoing with the Clerk of the  
6                   Court using the CM/ECF system which will send notification of such filing to the  
7                   following:

8                   Michael McFarland, Jr.  
9                   Sean E. Harkins  
10                  Evans Craven & Lackie  
11                  818 W. Riverside Avenue, Suite 250  
12                  Spokane, WA 99201  
13                  [sharkins@ecl-law.com](mailto:sharkins@ecl-law.com)  
14                  [mmcfarland@ecl-law.com](mailto:mmcfarland@ecl-law.com)  
15                  Attorneys for Defendants Wenatchee  
16                  School District

17                  DATED this 15<sup>th</sup> day of November, 2018, at Wenatchee, Washington.

18                    
19                  Melissa G. Campbell, Paralegal  
20                  melissa@volynlawfirm.com